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Property in everything: some background to the Magna Carta

I will soon be posting portions of a translation of the Magna Carta (the Great Charter) interspersed with my own commentary. Besides the background of the above link, here is some background on the nature of law and political structure in the lands of King John in 1215, and on why the document is more relevant to the modern United States than it is to modern England.

What follows is a necessarily oversimplified summary, but it can be used to reconstruct almost all of the law of King John's England pertinent to Magna Carta. Such a summary must in some ways be very alien to modern minds, so if you question this summary in any way please read the Magna Carta itself first before commenting, as you will probably find that the alien law as I describe it is in fact reflected in that Great Charter.

The basic building block of English legal and political structure was quite simple: property. Tyler Cowen talks about modern "markets in everything." In King John's England there was property in everything. Often, however, it was property that could not be easily bought or sold, but only inherited or transfered in marriage (like the kingship itself). Every political office and every legal right was such a property right. Jurisdiction, the right to make law, as well as goods and land -- all was property. Often these rights were appurtenant (i.e. attached to) rights in other kinds of property. For example, the jurisdiction and right to enforce judgments of manorial courts via certain remedies (a subset of the remedies available to royal common law courts) came bundled with tenure to the manor'sland. For example, if the king had granted a land to a lord in fee simple (i.e. perpetual) tenure, that lord would by an appurtenant express grant or sometimes implicitly (by prescription or custom) have jurisdiction over the manor's sub-tenants and villiens (serfs). Jursidiction over market fairs and their participants, and the ability to enforce court judgments by the limited remedy of distraining (attaching) goods in those markets, came bundled with the royal or baronial franchise to operate the market. Even in the 18th century, Blackstone described the entire political structure of England under the legal category of "the rights of persons." Every office and authority was held as a property right, and every liberty of a tenant or other subject was an easement that restricted such a property right.

Tenures such as fee simple, estates for life, etc. are the ancestors of modern forms of ownership (which still go under these names), but are also akin to leases insofar as they entailed obligations such as to pay rent. Rent paid to the king included "scutage" and "aid" -- the ancestor of what we now call taxes. The Magna Carta forces the king to gain the "consent" of his immediate tenants via a vote of what became Parliament before collecting such rents. Tenancy was also in some ways akin to modern citizenship, as the obligations of a tenant often included providing military service and submitting to the jurisdiction of the landlord where such jurisdiction was appurtenant to that lord's property. The jurisdiction of the royal courts was appurtenant to the king's original ownership of his realm, and many lords also had jurisdictions appurtenant to their manors.

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Nick Szabo

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Thus, the Magna Carta's language is quite akin to either a medieval or a modern property deed that grants various rights and reserves various easements appurtenant (i.e. attached to) the property in question. Any such deed, license, or charter grants a subset of the bundle of rights belonging to the current owner to the new owner or (in the case of a lease) tenant. The Magna Carta is such a property deed. The property in question is the entire kingdom and various subsets thereof, and the various rights and easements are appurtenant to the entire kingdom or particular subsets thereof. The rights the charter grants are to "all free men of the kingdom" or various subsets thereof. The "kingdom" is the property of the king and his heirs from which he is granting rights to English subjects and their heirs.

Except for the king, who under Norman theory owned all original rights in the realm, these rights took the form of tenures (somewhat akin to our leases) and franchises. In theory all such rights became such by grants from the king. In practice these "grants" often recognized pre-existing rights. Thus they were akin to both prescriptive property rights and to natural or customary legal rights. These tenures or franchises were often granted perpetuity; sometimes they were for a term of years. If they were granted in perpetuity, under English law (which unlike Roman law did not recognize the totalitarian idea of sovereignty) they could not be legally taken back by future kings. The Magna Carta, for example, grants "all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs." The listed liberties are a mix of rights granted to pacify rebellious subjects and the recognition of prescriptive rights, often of a very broad (unenumerated) nature.

The totalitarian idea of sovereignty, derived from the ancient law of the Roman emperors in Justinian's *Institutes*, whereby emperors were the source of all law (the sovereign) and could always disobey or retract their own edicts, was much later adopted (at least the retraction part) in England as the sovereignty of Parliament. This new "democratic" sovereignty asserted that Parliament could abrogate rights granted in perpetuity by previous royal charters. This was the main legal idea in dispute in the American Revolution. The colonists argued that Parliament could not abrogate the royal charters to the colonies which, like the parts of the Magna Carta which recognized the rights of cities, towns, and the Church in a sweeping way, recognized customs and liberties of the inhabitants of colonies in a sweeping way.

During and after their successful rebellion, the North American colonists adopted state constitutions, the Articles of Confederation, and the United States Constitution. These were modeled on previous royal charters and, contrary to the recent innovation of Parliamentary sovereignty that the colonists rebelled against, could not be abrogated by mere legislation. In a democratic compromise, however, (following James Wilson's vague idea of the "sovereignty of the people"), these charters were adopted by super-majority votes of "the people" (typically conventions of representatives) and could be amended by super-majority votes (legislatures, referendums, and/or conventions). Thus, the United States introduced democracy while maintaining the idea of perpetual rights that cannot be abrogated by mere majorities. Thus the Magna Carta, one of the earliest charters granting perpetual rights, is even more important to the United States than it is to the democratic, yet totalitarian, modern England.

Posted by Nick Szabo at 7:32 PM

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